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No. 06-989

# In the Supreme Court of the United States

HALL STREET ASSOCIATES, L.L.C.,

*Petitioner*,

v.

MATTEL, INC.

*Respondent*.

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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## BRIEF OF CTIA—THE WIRELESS ASSOCIATION® AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

CTIA—The Wireless Association® submits this brief as amicus curiae in support of petitioner Hall Street Associates, L.L.C.[1]

### INTEREST OF THE *AMICUS CURIAE*

CTIA—The Wireless Association®, formerly known as the Cellular Telecommunications & Internet Association ("CTIA") represents all sectors of the wireless communications industry. Members of CTIA include service providers, manufacturers, wireless data and internet companies, as well as other contributors to the wireless universe. CTIA frequently participates in regulatory and judicial proceedings and coordinates efforts to educate government agencies and the public about wireless issues.

Many of CTIA's members have adopted as standard features of their business contracts provisions that in appropriate circumstances mandate the arbitration of disputes arising from or relating to those contracts. They use arbitration because it is a prompt, fair, inexpensive, and effective method of resolving disputes. CTIA sponsored the Wireless Industry Arbitration Rules (see http://www.adr.org/sp.asp?id=22214), which are administered by the American Arbitration Association and which have been incorporated in the arbitration agreements of many members of the industry.

CTIA's members currently use or are considering using arbitration provisions that reject the default rules governing judicial review of arbitration awards and instead provide that

[1] Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, its members, and its counsel made a monetary contribution to this brief's preparation or submission. The parties' letters consenting to the filing of this brief have been filed with the Clerk's office.

judges may vacate or modify an arbitration award on the ground that it is based on an error of law or is unsupported by the evidence. In instances when the parties to an arbitration agreement contract around the default judicial-review rules, they have made a calculated decision that the risks of an erroneous arbitration award outweigh the slightly increased procedural costs involved in authorizing expanded judicial review.

By refusing to enforce such a provision in this case, the Ninth Circuit ignored not only the parties' desires but also Congress's intent in enacting the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1–16. Were the lower court's decision to stand, it could easily prove to be a poison pill that causes CTIA's members to give up on arbitration in a wide variety of circumstances. Because such an outcome is in no one's interest and flies directly in the face of the policies animating the FAA, CTIA has a strong interest in this Court reversing the decision below.

## INTRODUCTION AND SUMMARY OF ARGUMENT

As Judge Kozinski has noted, the legal question presented in this case—whether the parties to an arbitration agreement may contractually provide for judicial review of an arbitral award on grounds broader than those specified in Sections 10 and 11 of the FAA—is "closer than most." *La-Pine Tech. Corp.* v. *Kyocera Corp.*, 130 F.3d 884, 891 (9th Cir. 1997) (Kozinski, J., concurring), *overruled by Kyocera Corp.* v. *Prudential-Bache Trade Svcs., Inc.*, 341 F.3d 987 (9th Cir. 2003) (en banc), *cert. dismissed*, 540 U.S. 1018 (2004). We submit that there is enough play in the joints of the FAA to allow the parties to contractually expand the grounds for vacating or modifying an award. Because we expect petitioner to address the statutory argument in detail, however, we focus here on demonstrating that there are no valid *policy* justifications for affirming the Ninth Circuit's decision. Federal arbitration law is animated by two overarching principles: that contractual arbitration agreements

should be enforced as written and that private parties should be encouraged to arbitrate their disputes. A ruling for respondent would undermine each of these policies.

***A***. It is well established that arbitration is a creature of contract and that one of the fundamental animating principles of the FAA is to enforce contractual arbitration agreements as drafted. See, *e.g.*, *Volt Info. Scis.* v. *Bd. of Trustees of the Leland Stanford Jr. Univ.*, 489 U.S. 468, 478–479 (1989). Here, the parties agreed to arbitrate this dispute, and one aspect of that contractual agreement was the condition that any eventual arbitral award could be reviewed in court for legal error. Under the FAA, the parties' arbitration agreement should be enforced according to its terms—and it is at best unseemly for respondent, having contractually agreed to an arbitration clause providing for judicial review of legal errors, now to argue that the district court lacked the power to engage in such review.

***B***. As this Court has repeatedly noted, in enacting the FAA Congress also specifically intended to encourage parties to agree to arbitrate their disputes. See, *e.g.*, *Southland Corp.* v. *Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 23–24 (1982). But as this and other cases demonstrate, there are a variety of situations in which parties may be unwilling to agree to arbitrate a dispute without providing for expanded judicial review of the arbitrator's decision. Thus, a ruling for respondent in this case would decrease the number of disputes sent to arbitration—a result completely antithetical to this animating principle of the FAA.

Accordingly, and because nothing in the statutory text of the FAA mandates a contrary result, this Court should reverse the decision below and reaffirm that parties may structure their arbitration clauses as they see fit.

## ARGUMENT

### A. The Federal Arbitration Act mandates that the terms of contractual arbitration agreements—including provisions altering the default rules for judicial review—be enforced as drafted.

1. Section 2 of the FAA mandates that a "written provision * * * to settle [a controversy] by arbitration * * * shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. As this Court explained in *Volt*, "Congress' principal purpose" in enacting the FAA was to "ensur[e] that private arbitration agreements are enforced according to their terms." 489 U.S. at 478. In other words, under the FAA "arbitration is simply a matter of contract between the parties." *First Options of Chicago, Inc.* v. *Kaplan*, 514 U.S. 938, 943 (1995).

It therefore follows necessarily that "parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted." *Volt*, 489 U.S. at 479. The FAA does not require that arbitration be conducted "under a certain set of procedural rules." *Id.* at 476. And in particular, it does not "prevent[] the enforcement of agreements to arbitrate under different rules than those set forth in the Act itself. Indeed, such a result would be quite inimical to the FAA's primary purpose of ensuring that private agreements to arbitrate are enforced according to their terms." *Id.* at 479.

Judge Posner has famously made the same point in somewhat more colorful terms: "[S]hort of authorizing trial by battle or ordeal or, more doubtfully, by a panel of three monkeys, parties can stipulate to whatever procedures they want to govern the arbitration of their disputes." *Baravati* v. *Josephthal, Lyon & Ross, Inc.*, 28 F.3d 704, 709 (7th Cir. 1994) (Posner, J.).

Thus, just as parties must be free to choose the number of arbitrators, the discovery rules governing the arbitration, and whether arbitration will be stayed pending related litigation or vice versa, so too must the parties be free to choose the rules governing the standards for judicial confirmation of an arbitral award. Cf. *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 67 (1995) ("'Just as [parties] may limit by contract the issues which they will arbitrate, so too may they specify by contract the rules under which that arbitration will be conducted.'") (quoting *Volt*, 489 U.S. at 479). Any other result would violate the foundational principle that parties are free to structure their arbitrations as they see fit.

2. The Ninth and Tenth Circuits—the only two federal courts of appeals to hold that parties may not contractually expand the grounds for vacating or modifying an arbitral award—rested their rulings on a fundamentally different and incomplete understanding of the policies underlying the FAA.. According to the Ninth Circuit, Congress did not want to "permit unnecessary public intrusion into private arbitration procedures." *Kyocera Corp.*, 341 F.3d at 998. It reasoned that "[b]road judicial review of arbitration decisions could well jeopardize the very benefits of arbitration, rendering informal arbitration merely a prelude to a more cumbersome and time-consuming judicial review process." *Ibid.* As the Ninth and Tenth Circuits see it, Congress intended to permit parties "to trade the greater certainty of correct legal decisions by federal courts for the speed and flexibility of arbitration determinations" (*ibid.*), and "limited review ensures judicial respect for the arbitration process" (*Bowen* v. *Amoco Pipeline Co.*, 254 F.3d 925, 935 (10th Cir. 2001)). Conversely, "[c]ontractually expanded standards * * * threaten to undermine the independence of the arbitration process." *Id.* at 935. "Expanded judicial review * * * reduces arbitrators' willingness to create particularized solutions" and "would require arbitrators to issue written opinions with conclusions of law and findings of fact, further sacrificing the simplicity,

expediency, and cost-effectiveness of arbitration." *Id.* at 936 & n.7.

This analysis fails to credit the diversity of forms that privately negotiated arbitration agreements may take, and, in so doing, pays no heed to Congress's intent in passing the FAA. Although limited judicial review is a convenient *default*, parties may contract around it without doing violence to the policies served by the Act. "While Congress was no doubt aware that the Act would encourage the expeditious resolution of disputes, its passage 'was motivated, first and foremost, by a congressional desire to enforce agreements into which parties had entered.'" *Volt*, 489 U.S. at 478 (quoting *Dean Witter Reynolds Inc.* v. *Byrd*, 470 U.S. 213, 220 (1985)); see also *Byrd*, 470 U.S. at 219 ("We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims."). "The basic objective" of the FAA "is not to resolve disputes in the quickest manner possible," but rather to implement the parties' wishes. *First Options*, 514 U.S. at 947.

3. It is also not a valid rejoinder to claim that provisions authorizing expanded judicial review will increase the workload of courts. Cf. Hans Smit, *Contractual Modification of the Scope of Judicial Review of Arbitral Awards*, 8 AM. REV. INT'L ARB. 147, 149 (1997). Although it is admittedly an empirical question on which we know of no data, there is good reason to believe that, if anything, the reverse is likely to prove true: Were this Court to hold that parties could not contract for expanded judicial review of arbitration decisions, it seems quite likely that some number of disputes that otherwise might have proceeded to arbitration will instead by litigated *ab initio*—and there can be no serious question that presiding over the whole host of pretrial and trial proceedings inherent in federal litigation would prove more burdensome to a federal district court than engaging in slightly-more-

extensive review of an arbitral award.[2] See *LaPine*, 130 F.3d at 891 (Kozinski, J., concurring) ("enforcing [an] arbitration agreement—even with enhanced judicial review—will consume far fewer judicial resources than if the case were given plenary adjudication").

To be sure, as Judge Kozinski noted in *LaPine*, one can imagine specific judicial-review provisions that might be unenforceable; for example, Judge Kozinski would not enforce an arbitration agreement that specified that "the district judge would review the award by flipping a coin or studying the entrails of a dead fowl." *Ibid.* But that limitation goes to judicial competence, not judicial authority under the FAA. There is no policy reason why a district court judge should not be allowed to determine whether an arbitrator misinterpreted the law, if the parties have specified by contract that the court should have that authority.

**B. Refusing to enforce contractual agreements to expand the grounds for vacating or modifying an arbitral award would undermine Congress's goal of encouraging parties to arbitrate their disputes.**

As this Court recently reiterated, Section 2 of the FAA "embodies the national policy favoring arbitration." *Buckeye Check Cashing, Inc.* v. *Cardegna*, 126 S. Ct. 1204, 1207 (2006). The statute "is a congressional declaration of a liberal federal policy favoring arbitration agreements, notwithstanding any state substantive or procedural policies to the contrary." *Moses H. Cone*, 460 U.S. at 24; see also, *e.g.*, *Rodriguez de Quijas* v. *Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1987) (expressing the Court's "strong endorsement

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[2] Because the FAA does not create federal subject-matter jurisdiction (see *Moses H. Cone*, 460 U.S. at 25 n.32), any dispute in which a federal court would have jurisdiction to confirm an arbitral award under the FAA would also be a dispute over which the federal court would have subject matter jurisdiction to preside over full-blown litigation.

of the federal statutes favoring this method of resolving disputes"); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985) (noting the "emphatic federal policy in favor of arbitral dispute resolution"); *Southland Corp.*, 465 U.S. at 10 ("[i]n enacting § 2 of the federal Act, Congress declared a national policy favoring arbitration"); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20, 25 (1991) (FAA "manifest[s] a 'liberal federal policy favoring arbitration agreements'") (quoting *Moses H. Cone*, 460 U.S. at 24).

But it is clear that some parties will be unwilling to agree to arbitrate their disputes, or at least certain types of disputes, if they cannot contractually expand the bases for vacating or modifying the arbitrator's decision. Among other things, parties may decide that they are unwilling to "bet the company" on arbitration, where there is some risk of a rogue arbitrator issuing an unsupportable decision.[3]

In fact, Justice Souter noted this concern during the oral argument in *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444 (2003)—there, over the effect of a more-or-less unreviewable decision by an arbitrator to certify a class in an ar-

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[3] Several courts have refused to review large, disproportionate punitive damages awards imposed by arbitrators even though those awards almost surely would have been reduced dramatically had they been imposed by a jury. Compare, *e.g.*, *Stark* v. *Sandberg, Phoenix & von Gontard, P.C.*, 381 F.3d 793, 802–803 (8th Cir. 2004) (reversing district court's vacatur of $6 million arbitrator-imposed punitive award that was 3,000 times the compensatory damages and explaining that by "removing the matter to arbitration," the defendant "got exactly what it bargained for") (internal quotation marks omitted) with *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 797–799 (8th Cir. 2004) (reducing $6 million jury-imposed punitive award to $600,000 where compensatory damages were $600,000). Without the ability to contractually provide for review for legal excessiveness, businesses will be understandably reluctant to venture into the arbitral forum.

bitration—by questioning whether, "[w]ithout judicial review, [a party to an arbitration agreement] would * * * have rolled the dice for $27 million on one arbitrator." See Tr. of Oral Argument, *Green Tree Fin. Corp.* v. *Bazzle*, 539 U.S. 444 (No. 02-634), 2003 WL 1989562, at 47 (Apr. 22, 2003); see also *id.* at 29 (observation of one Justice that "[y]ou might not want to put your company's entire future in the hands of one arbitrator").

Commentators also have recognized this concern. As one has explained, "[i]n recent years there has been a growing concern over the "Russian Roulette" nature of arbitration. In several conspicuous, high stakes disputes * * * arbitrators have rendered decisions that have fallen well outside the reasonable expectations of the parties." Stephen P. Younger, *Agreements to Expand the Scope of Judicial Review of Arbitration Awards*, 63 ALB. L. REV. 241, 241 (1999); see also, *e.g.*, Alan Scott Rau, *Contracting out of the Arbitration Act*, 8 AM. REV. INT'L ARB. 225, 259 (1997). Expanded judicial-review provisions address this concern, and allow parties to arbitrate disputes that they otherwise might be unwilling to arbitrate.

Of course, this is not to say that expanded judicial review should be *mandated*. We presume that in the vast majority of arbitration agreements the parties will continue to choose savings in procedural cost over the protection afforded by expanded judicial review appeals. But what policy does it serve to deny expanded judicial review to those who want it? If this Court holds that the FAA precludes contracting for broader review, more and more parties will eschew arbitration, which will undermine Congress's goal of encouraging arbitration.

Thus, a ruling for respondent in this case would decrease the number of disputes sent to arbitration—and will add to the workload of our already-overburdened courts—an outcome that is completely antithetical to the national policy favoring the arbitration of disputes.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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